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# UEM Genisys Sdn Bhd (in liquidation) & Ors v Genisys Integrated Engineers Pte Ltd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2598–12 OF 2018
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND SEE MEE CHUN JJCA
5 JANUARY 2022

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*Limitation — Contract — Deduction — Company that appointed subcontract in construction contract was wound up — Subcontractor filed proof of debt ('POD') for monies due to it under the contract — When company received funds from different source, liquidators paid subcontractor small fraction of its POD sum and disallowed the rest to off-set fees and interest subcontractor contractually owed the company — Whether deduction of the fees and interest was wrong as those sums had become time-barred vis à vis the company — Whether subcontractor itself was time-barred under Limitation Act 1953 from suing company to recover its debt — Whether subcontractor's cause of action accrued when architect issued certificate of payment at conclusion of project*

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The first appellant ('UEG') was subcontracted to carry out mechanical and electrical ('M&E') works in a construction project. UEG, in turn, subcontracted its work to the respondent ('GIE') ('the sub-subcontract'). The due performance of UEG's subcontract was guaranteed by Gammon Construction Ltd ('Gammon Construction'). For some reason, work on the entire project was called off and the architect issued a certificate of payment on 6 November 2000. Five years later, the High Court wound up UEG and appointed the second and third appellants as its liquidators. In March 2011, GIE filed a proof of debt ('POD') against UEG for the sum of USD997,750.70. In August 2015, Gammon Construction paid UEG USD1,215,832.19 in full and final settlement of UEG's claim against it under the guarantee. Four months later, GIE received payment of USD179,075.81 from UEG. The liquidators informed GIE that the remainder of its POD claim would not be allowed as a deduction of USD445,660.90 and a further sum of USD371,142.66 had been made from the total POD claim — the former amount being the procurement fees that GIE was obliged to pay UEG under cl 10(A) of the sub-subcontract while the latter sum was the interest payable on the outstanding procurement fees pursuant to cl 10(B) of the sub-subcontract. GIE took the view that these deductions should not have been made as they were time-barred vis à vis UEG. After sending UEG a demand for payment of USD1,006,880, GIE in December 2017 sued UEG to recover the amount. GIE also sought an order that the liquidators be held personally liable to bear the costs of the litigation as the suit was necessitated by their deduction of the

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outstanding procurement fees and interest from the POD amount. In allowing GIE's claims, the High Court held, inter alia, that GIE's action was not time-barred because it was not based on the 6 November 2000 certificate of payment but on the receipt by UEG of the settlement sum from Gammon Construction in August 2015. The instant appeal was against the High Court's decision.

**Held**, unanimously allowing the appeal and setting aside the High Court's decision:

(1) By GIE's own evidence, the claim in its proof of debt was based on the architect's certificate of payment dated 6 November 2000 which became due on 20 November 2000. The cause of action accrued on 20 November 2000 and limitation would have set in on 20 November 2006 by virtue of s 6(1)(a) of the Limitation Act 1953. GIE's claim filed on 14 December 2017 was thus time-barred (see para 34).

(2) GIE's claim could not possibly arise from the guarantee notwithstanding evidence that the consent judgment was pursuant to the M&E contract and was entered into pursuant to the work performed by GIE. This was because the POD was clearly based on the architect's certificate of payment and para 20 of GIE's statement of claim and the references to rights and benefits in the sub-subcontract dated 15 August 1996 pre-dated the guarantee dated 20 August 1997. The sub-subcontract could not therefore have envisaged any rights and benefits accruing after the event in the form of the guarantee to accrue subsequently to GIE. Further, the guarantee was between Gammon Construction and UEG and so too was the consent judgment (see para 35).

(3) The deduction of USD445,660.90 for the procurement fee was not time-barred. The procurement fee was provided for in cl 10(A) of the sub-subcontract. The fee was 3% of the M&E contract sum. Clause 10(B) required GIE to within 14 days after receipt of the M&E contract sum from the main contractor pay the procurement fee to UEG. This was an express contractual right due to UEG. Despite this, it would appear that GIE had kept the procurement fee for each certificate of payment all along. It was only discovered after the creditors meeting on 31 March 2012 that the procurement fee on the entire contract sum had not been paid. It was inequitable for GIE to now rely on limitation when it had benefitted from keeping the procurement fee all along. GIE had acknowledged, accepted and admitted that UEG was entitled to the deduction. This could be seen from the 15 October 2016 letter from GIE's solicitor, the affidavit affirmed on 8 May 2017 by Seow Boon Cheng and the notice of motion dated 15 May 2017. These were

admissions made by GIE and not an acknowledgement of a debt within the meaning of ss 26(2) and 27 of the Limitation Act (see paras 56, 48–50 & 54).

(4) The deduction of the procurement fee was an act that did not involve the courts and neither was it a claim for a set off or a counterclaim. In the circumstances, the deduction could not be said to be barred by limitation. Limitation could only be raised if there was a legal suit commenced to recover the amount concerned. It did not apply to a situation where UEG was deducting the procurement fee from a sum it recovered on its own when it sued on the guarantee (see paras 43 & 45).

(5) The deduction of late payment interest on the procurement fee could be made. Clause 10(B) of the sub-subcontract provided that GIE shall within 14 days of the receipt of the M&E contract sum pay to UEG the procurement fee. This was an express contractual provision on the due date for payment of the procurement fee. Although there was no express provision allowing for interest, given GIE's acceptance of when the due payment dates were, the imposition of interest was a commercial decision which could not be said to be fraudulent or unreasonable. Generally, interest would be granted to compensate a party who was deprived of the enjoyment of what was ordinarily due. The interest rate imposed could thus be justified and the court was not obliged to set it aside merely because it was inclined to a different decision from the liquidators (see paras 57, 58, 61 & 63).

(6) Given this court's finding that the deduction of amounts for the procurement fee and late penalty interest was justified and valid, the High Court's decision that the liquidators bear the costs of the proceedings could not stand (see para 65).

**[Bahasa Malaysia summary**

Perayu pertama ('UEG') telah disubkontrakkan untuk menjalankan kerja-kerja mekanikal dan elektrik ('M&E') dalam projek pembinaan. UEG seterusnya telah memasuki subkontrak kerjanya kepada responden ('GIE') ('sub-subkontrak'). Prestasi wajar subkontrak UEG dijamin oleh Gammon Construction Limited ('Gammon Construction'). Atas sebab tertentu, kerja-kerja di seluruh projek telah dibatalkan dan arkitek telah mengeluarkan sijil pembayaran pada 6 November 2000. Lima tahun kemudian, Mahkamah Tinggi telah menamatkan UEG dan melantik perayu kedua dan ketiga sebagai pelikuidasinya. Pada bulan Mac 2011, GIE memfailkan bukti hutang ('POD') terhadap UEG untuk jumlah USD997,750.70. Pada bulan Ogos 2015, Gammon Construction membayar UEG USD1,215,832.19 untuk penyelesaian penuh dan muktamad terhadap tuntutan UEG terhadapnya di bawah satu jaminan. Empat bulan kemudian, GIE menerima bayaran sebanyak USD179,075.81 daripada UEG. Pelikuidasi memaklumkan kepada

GIE bahawa baki tuntutan bukti hutangnya sebagai potongan sebanyak USD445,660.90 adalah tidak dibenarkan dan sejumlah USD371,142.66 telah dibuat daripada jumlah tuntutan bukti hutang — jumlah terdahulu adalah yuran perolehan yang wajib dibayar oleh GIE untuk membayar UEG di bawah klausa 10(A) subkontrak manakala jumlah terakhir adalah faedah yang perlu dibayar ke atas bayaran perolehan yang tertunggak menurut klausa 10(B) sub-subkontrak. GIE menghujahkan bahawa potongan ini tidak sepatutnya dibuat kerana ianya dihalang oleh had masa oleh UEG. Setelah menyerahkan tuntutan kepada UEG untuk pembayaran sebanyak USD1,006,880, GIE pada Disember 2017 menyaman UEG untuk mendapatkan semula jumlah tersebut. GIE juga memohon perintah agar pelikuidasi bertanggungjawab secara peribadi untuk menanggung kos litigasi kerana saman tersebut diperlukan untuk potongan mereka terhadap bayaran perolehan yang tertunggak dan faedah dari jumlah bukti hutang. Ketika membenarkan tuntutan GIE, Mahkamah Tinggi memutuskan bahawa, antara lain, tindakan GIE tidak dihalang oleh had masa kerana tindak tersebut bukanlah berdasarkan sijil pembayaran 6 November 2000 tetapi oleh penerimaan UEG untuk jumlah penyelesaian dari Gammon Construction pada bulan Ogos 2015. Rayuan ini di atas keputusan Mahkamah Tinggi tersebut.

**Diputuskan**, sebulat suara membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Dengan keterangan GIE sendiri, tuntutan bukti hutang tersebut adalah berdasarkan sijil pembayaran arkitek bertarikh 6 November 2000 yang luput pada 20 November 2000. Punca tindakan telah terakru pada 20 November 2000 dan had masa berakhir pada 20 November 2006 berdasarkan s 6(1)(a) Akta Had 1953. Tuntutan GIE yang difailkan pada 14 Disember 2017 adalah dihalang oleh had masa (lihat perenggan 34).

(2) Tuntutan GIE tidak mungkin timbul daripada jaminan tersebut walaupun terdapat keterangan yang menunjukkan bahawa penghakiman persetujuan adalah menurut kontrak M&E dan telah dimeterai menurut kerja yang dilakukan oleh GIE. Hal ini kerana bukti hutang tersebut adalah jelas berdasarkan sijil pembayaran arkitek dan perenggan 20 penyataan tuntutan GIE dan rujukan kepada hak dan faedah dalam sub-subkontrak bertarikh 15 Ogos 1996 jaminan yang berkuatkuasa kebelakang bertarikh 20 Ogos 1997. Oleh itu, sub-subkontrak tidak menyatakan sebarang hak dan faedah yang terakru selepas jaminan tersebut terakru selepas GIE. Selanjutnya, jaminan tersebut adalah antara Gammon Construction dan UEG dan begitu juga penghakiman persetujuan (lihat perenggan 35).

(3) Potongan sebanyak USD445,660.90 untuk bayaran perolehan tidak dihalang oleh had masa. bayaran perolehan tersebut diperuntukkan dalam klausa 10(A) sub-subkontrak. Bayaran yang ditetapkan adalah 3%

daripada jumlah kontrak M&E. Klausa 10(B) menghendaki GIE dalam tempoh 14 hari selepas menerima jumlah kontrak M&E daripada kontraktor utama membayar bayaran perolehan kepada UEG. Hal ini merupakan hak yang jelas di dalam kontrak kepada UEG. Walaupun begitu, GIE telah menyimpan bayaran perolehan untuk setiap sijil pembayaran selama ini. Hal ini diketahui ketika mesyuarat pemiutang pada 31 Mac 2012 bahawa bayaran perolehan ke atas keseluruhan jumlah kontrak belum dibayar. Adalah tidak adil bagi GIE untuk bergantung pada had masa pada ketika ini apabila mereka sendiri telah mendapat manfaat kerana menyimpan bayaran perolehan tersebut selama ini. GIE telah mengakui bahawa UEG berhak mendapat potongan tersebut. Hal ini dapat dilihat dari surat 15 Oktober 2016 dari peguam GIE, afidavit yang diikrarkan pada 8 Mei 2017 oleh Seow Boon Cheng dan notis usul bertarikh 15 Mei 2017. GIE telah mengakui perkara ini dan ianya bukan merupakan satu pengakuan hutang menurut ss 26(2) dan 27 Akta Had Masa (lihat perenggan 56, 48–50 & 54).

(4) Potongan bayaran perolehan merupakan tindakan yang tidak melibatkan mahkamah dan tidak juga merupakan satu tuntutan untuk penolakan atau tuntutan balas. Dalam keadaan ini, potongan tersebut tidak boleh dikatakan dihalang oleh had masa. Had masa hanya boleh digunapakai sekiranya terdapat saman yang difailkan untuk mendapatkan semula jumlah yang berkenaan. Ianya tidak terpakai kepada situasi ini di mana UEG telah menolak bayaran perolehan daripada jumlah yang telah diperolehinya sendiri ketika menyaman untuk jaminan tersebut (lihat perenggan 43 & 45).

(5) Potongan faedah pembayaran lewat ke atas bayaran perolehan boleh dibuat. Klausa 10(B) sub-subkontrak manyatakan bahawa GIE hendaklah dalam tempoh 14 hari dari tarikh penerimaan jumlah kontrak M&E membayar kepada UEG bayaran perolehan. Peruntukan ini adalah jelas di dalam kontrak yang menunjukkan tarikh akhir pembayaran bayaran perolehan. Walaupun tiada peruntukan nyata yang membenarkan tuntutan faedah, GIE telah menerima bila tarikh pembayaran yang sepatutnya dibuat. Maka, faedah tersebut adalah menurut amalan komersial yang tidak boleh dikatakan sebagai penipuan atau tidak munasabah. Secara amnya, faedah akan diberikan untuk memberi pampasan kepada pihak terkilan. Oleh itu, kadar faedah boleh dibenarkan dan mahkamah tidak diwajibkan untuk mengenepikannya hanya kerana ianya boleh menyebabkan keputusan yang berbeza daripada pelikuidasi (lihat perenggan 57, 58, 61 & 63).

(6) Memandangkan penemuan mahkamah ini bahawa potongan jumlah untuk bayaran perolehan dan faedah penalti lewat adalah wajar dan sah, keputusan Mahkamah Tinggi bahawa pelikuidasi menanggung kos prosiding tidak dapat dipertahankan (lihat perenggan 65).]

**Cases referred to**

*Chuah Eng Khong v Malayan Banking Berhad* [1998] 3 MLJ 97, FC (refd)
*Fairview Schools Bhd v Merger Insight (M) Sdn Bhd* [2017] MLJU 1031, CA (refd)
*Majlis Perbandaran Klang v Generation Products Sdn Bhd* [2006] 4 MLJ 635, CA (folld)
*Maylord Equity Management Pty Ltd v Reeltime Media Ltd (No 2)* [2008] NSWSC 1133, SC (refd)
*Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v Yeoh Oon Theam* [2016] MLJU 1126, CA (folld)
*Silvia v Brodyn Pty Ltd* [2007] NSWCA 55, SC (refd)
*United Malayan Banking Corp Bhd v PTL Marketing Services Sdn Bhd (formerly known as Lee Yin Trading Sdn Bhd) & Ors* [2004] 5 MLJ 337, HC (distd)
*Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54, FC (refd)
*Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629, FC (refd)
*Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478, FC (refd)

**Legislation referred to**

Companies (Winding-Up) Rules 1972 rr 92, 93, Form 59
Companies Act 1965 (repealed by Companies Act 2016) s 487(3)
Limitation Act 1953 ss 2(1), 6, 6(1)(a), 26, 26(2), 27, 27(1), (2), 31

**Appeal from**: Civil Suit No WA-22NCC-502–12 of 2017 (High Court, Kuala Lumpur)

*T Baskaran (Roveena Kaur and T Dheenish with him) (Baskaran) for the appellants.*
*Brian Earnest Cumming (Ashvinpal Kaur with him) (Gideon Tan Razali Zaini) for the respondent.*

**See Mee Chun JCA:**

INTRODUCTION

**[1]** The respondent/plaintiff ('Genisys Intergrated Engineers Pte Ltd, GIE') had filed a claim in the High Court against the first appellant/first defendant, ('UEM Genisys Sdn Bhd, UEG') and the second and third appellants/second and third defendants ('liquidators'). The High Court allowed GIE's claim and hence this appeal.

**[2]** We allowed the appeal by UEG and the liquidators and we now give our reasons.

A BACKGROUND FACTS

**[3]** At the High Court, the parties had agreed to a set of facts (encl 3/135–141) which we reproduce below but not in the sequence as they were presented. We intend to set out the facts as per broad areas:

B (a) the various contracts:

(i) by an agreement in writing and dated 2 November 1993 ('the shareholders' agreement'), UEM Group Berhad (formerly known as United Engineers (Malaysia) Bhd and GIE agreed to form UEG;

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(ii) by an agreement in writing and dated 9 February 1996 ('the main contract') an unincorporated joint venture comprised of Gammon Construction Ltd ('Gammon Construction') and Road Builder (M) Sdn Bhd trading as Gammon-Road Builder Joint Venture ('Gammon-Road Builder') agreed to perform certain works, more particularly described as the Proposed International Class Hotay at Hanoi, Vietnam, for Berjaya Hotay Joint Venture Co Ltd (formerly known as Vietnam-Malaysia Joint Venture Co Ltd) ('Berjaya-Hotay');

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(iii) by an agreement in writing and dated 24 May 1996 ('the subcontract'), UEG agreed to perform part of the works under the main contract described as supply and installation of mechanical and electrical systems ('the subcontract works') for Gammon-Road Builder;

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(iv) by an agreement in writing and dated 20 August 1996 ('the sub-subcontract'), GIE agreed to perform the subcontract works for UEG;

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(v) by an agreement in writing dated 18 December 1996 ('the main contract novation agreement'), Gammon-Road Builder novated all its rights and obligations under the main contract to Gammon-CC1 Construction Co Ltd ('Gammon-CC1'), with the consent of Berjaya-Hotay;

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(vi) by an agreement in writing and dated 20 August 1997 ('the sub-contract novation agreement'), Gammon-Road Builder novated all its rights and obligations under the subcontract to Gammon-CC1, with the consent of UEG;

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(vii) by an agreement in writing and dated 20 August 1997 ('the guarantee'), Gammon Construction guaranteed Gammon-CC1's due performance of the subcontract to UEG;

(viii) on 13 April 1998, Gammon-CC1 ceased all works and instructed

their subcontracts including UEG to cease works; and

(ix) GDP Architects Sdn Bhd issued a certificate of payment dated 6 November 2000.

(b) UEG wound up:

(i) by an order made on 20 October 2005, the High Court wound up UEG;

(ii) by an order made on 17 January 2006, the High Court appointed the second and third appellants as liquidators of UEG;

(iii) by a notice of appointment and situation of office of liquidators dated 7 February 2006, the Registrar of Companies was informed of the said appointment;

(iv) by an order made on 14 July 2008, the Court of Appeal allowed an appeal against the order made on 20 October 2005; and

(v) by an order made on 6 September 2010, the Federal Court allowed an appeal against the order made on 14 July 2008 and reinstated the order made on 20 October 2005.

(c) proof of debt:

(i) by a proof of debt dated 28 March 2011 ('the proof of debt'), GIE claimed for a sum of USD997,750.70;

(ii) by a letter dated 2 November 2015, the second appellant, on behalf of UEG, notified GIE that GIE's claim of USD997,750.70 in the proof of debt had been admitted to the extent of USD179,075.81;

(iii) by a letter dated 24 November 2015, GIE replied to the aforesaid letter dated 2 November 2015;

(iv) by a letter dated 7 December 2015, the second appellant, on behalf of UEG, denied GIE's aforesaid letter dated 24 November 2015 and maintained the second appellant's letter dated 2 November 2015; and

(v) GIE received payment of USD179,075.81 on 11 December 2015 from UEG.

(d) Civil suit by UEG against Gammon Construction.

(i) by a writ of summons dated 1 November 2006, vide Suit No 02-22–1556 of 2006 ('the Gammon Construction Suit'), UEG commenced proceedings against Gammon Construction pursuant to the guarantee.

(ii) by a consent judgment made on 5 August 2015, in the Gammon Construction Suit, Gammon Construction was ordered, inter alia,

to:

(A) pay a total sum of USD1,215,000 ('the settlement sum') to UEG on or before 19 August 2015; and

(B) failing which, Gammon Construction shall pay interest at the rate of 5%pa on the settlement sum from 20 August 2015 until the date of full settlement.

(iii) on 23 August 2015, Gammon Construction made full payment of the settlement sum to UEG. On 21 September 2015, Gammon Construction made further payment of USD832.19 for the period from 21 August 2015 to 23 August 2015, being interest pursuant to the Consent Judgment to UEG.

**[4]** By an order made on 5 September 2017 the High Court granted leave to GIE to commence proceedings against UEG. By letter dated 22 November 2017, the solicitors for GIE demanded the sum of USD1,006,880 from UEG. By letter dated 5 December 2017, the solicitors for UEG replied to the letter.

THE CLAIM

**[5]** GIE's claim against UEG is premised on a breach of the sub-subcontract dated 1 August 1996. The claim against the liquidators is for them to indemnify the costs of the High Court proceedings due to their ultra vires and/or vexatious action causing GIE having to commence the action.

REFERENCES TO subcontract AS SUB-SUBCONTRACT

**[6]** We add here that although the High Court and GIE had referred to the contract between UEG and GIE as the subcontract, it is noted in para 11 of the agreed facts that this contract was a sub-subcontract. Hence we will refer to it as such and will construe all references by the High Court and GIE to subcontract as the sub-subcontract.

FINDINGS OF THE HIGH COURT

**[7]** The High Court started on the footing that GIE's claim was premised on the failure of UEG to fulfil its contractual obligations to pay the consent judgment sum and the additional interest pursuant to the sub-subcontract. References to cll 2 and 10 of the sub-subcontract were made, and by cross reference to the guarantee which was said to 'cannot stand alone', it was held that the consent judgment sum and the additional interest are rights and benefits arising from the contract which should afford to GIE.

**[8]** It was also found that the deduction of USD445,660.90 as the procurement fee from GIE's claim of USD997,750.70 in the POD was time

barred and caught by s 31 of the Limitation Act. The High Court took cognisance that the liquidators had taken the position that the procurement fee may be barred by limitation at the material time. The contention of acknowledgment by GIE such that limitation had not set in was rejected as such acknowledgment were after the liquidators' letter of 2 November 2015 notifying of the deduction of the procurement fee.

**[9]** It was further found that GIE's entitlement was not time barred as it was not based on GDP architect's certificate of payment dated 6 November 2000 but on the receipt of the consent judgment sum and the additional interest.

**[10]** The liquidators ought to take the first step in notifying GIE of the rejection of POD by issuing the notice of rejection in Form 59. As that was not issued, r 93 on appeal by the creditor could not assist UEG. It was only on 2 November 2015 the formal reply was given. The issue had been ventilated at GIE's leave application at the winding up court and was res judicata.

**[11]** The liquidators were held to be personally liable for the costs of proceedings on an indemnity basis. They had unnecessarily caused GIE to commence the action. The unreasonable and vexatious conduct is demonstrated by the deduction of the procurement fee despite knowing it was time barred. When they were informed of the disagreement, they ought to have sought the court's direction pursuant to s 487(3) Companies Act 1965 then applicable.

SUBMISSIONS OF THE APPELLANTS

**[12]** It was firstly submitted that with regard to the liquidators, the judgment in open court pronounced on 21 November 2018 where there was no wilful/wrongful/vexatious conduct is in conflict with the written grounds of judgment dated 11 March 2019 which found there to be vexatious conduct. Only the first judgment in open court where the liquidators were found not liable ought to be considered. Further, the conflicting judgements are grounds for re-trial.

**[13]** GIE's claim was time barred as the certificate of payment dated 6 November 2010 was due on 20 November 2000. UEG had by letter dated 15 November 2000 requested Gammon-CC1 to make payment to GIE based on the certificate of payment where the invoice was signed by Seow Boon Cheng ('PW1, Seow'). By letter dated 22 November 2000 UEG enclosed the aforesaid invoice where an amount of USD995,879.38 was stated to be due and owing and to be paid to GIE. The POD dated 28 March 2011 was stated

to be to be based on the certificate of payment. It was pleaded in para 20 of the statement of claim that notwithstanding the certification by the architect, the main contractor had not paid GIE.

**[14]** GIE's claim was said to be an abuse of process where it had not applied to reverse or vary the decision of the liquidators on the POD. GIE cannot be allowed to select another method to have their claim adjudicated by this action. Reference was made to rr 92 and 93 of the Companies Winding-Up Rules 1972. Although raised at the leave stage of the winding-up court, there was no res judicata as the issue had yet to be finally decided.

**[15]** With regard to the deduction of USD445,660.90 for the procurement fee from the POD, it was submitted that this was provided for in cl 10(8) of the sub-subcontract. Further this had been acknowledged, accepted and admitted by the letter of GIE's solicitor letter dated 15 October 2016, Seow's affidavit affirmed on 8 May 2017 and its notice of motion dated 15 May 2017. The admission made in the notice of motion was a judicial admission which stands on a higher footing than an evidentiary admission, *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478.

**[16]** The deduction did not involve the courts and is not an action of a claim for set off and s 31 of the Limitation Act 1953 was relied on. The word 'action' in the Limitation Act should not be construed to include steps taken to recover amounts without involving the courts, *Majlis Perbandaran Klang v Generation Products Sdn Bhd* [2006] 4 MLJ 635.

**[17]** The other deduction of USD371,142.66 from the POD was the interest due for failure to pay UEG and was in accordance with cl 10B of the sub-subcontract. GIE had accepted the due dates for payments in its reply to the defence and there was no challenge on the rate of interest applicable as per the evidence of Onn Kien Hoe ('DW1, Onn').

**[18]** The last point of submission was that the liquidators had not wilfully conducted themselves wrongfully, had not gone beyond their powers and/or acted vexatiously. This was because the liquidators were entitled to make the deductions. Where a matter is within the discretion of the liquidators, an application to the court for directions is not necessary.

SUBMISSIONS OF THE RESPONDENT

**[19]** It was submitted by GIE that the consent judgment sum and the additional interest obtained by UEG are rights and benefits which they are

entitled to pursuant to cll 28 and 20 of the sub-subcontract. This sum arose from the M&E contract which in turn arose from GIE's performance under the sub-subcontract . A

**[20]** In relation to the deduction of the procurement fee of USD445,660.90, GIE conceded to a deduction of USD29,876.38 which is 3% of the procurement fee on the outstanding contract sum of USD995,879.39. B

**[21]** It disputed the deduction of the balance procurement fee deduction of USD415,784.52 as it is statutorily time barred. UEG had prepared a tabulation in an appendix to a letter dated 2 November 2015 which showed these fees were due progressively from 22 July 1996 to 12 March 1998. UEG's cause of action would expire progressively from the period from 21 July 2002 to 11 March 2004 and clearly limitation has set in. The contention that s 6 of the Limitation Act does not apply as this was a deduction from POD where no action is needed to be commenced is an attempt to circumvent the aforesaid section and has been soundly put to rest in *United Malayan Banking Corp Bhd v PTL Marketing Services Sdn Bhd (formerly known as Lee Yin Trading Sdn Bhd) & Ors* [2004] 5 MLJ 337. C D

**[22]** It denied there was any acknowledgment of debt of the procurement fee as whatever acknowledgment was after the liquidators' letter dated 2 November 2015 notifying of the deduction. An acknowledgment has to be for debts subsisting at that time and not before or after. Reference was made to ss 26(2) and 27 of the Limitation Act and *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54. E F

**[23]** The deduction of late payment interest on the procurement fee was without basis as such imposition had to be a contractual right, *Chuah Eng Khong v Malayan Banking Berhad* [1998] 3 MLJ 97. Here, UEG through Onn confirmed there was no express provision for late payment interest in the sub-subcontract. G

**[24]** GIE's claim was not time barred as it is not premised on the certificate of payment but the sub-subcontract. H

**[25]** There was no abuse of process where GIE could not have availed itself of the procedure to reverse or vary the decision of the liquidators where no notice of rejection was ever issued. I

**[26]** The general rule is that the costs of legal proceedings is that of the company. Costs may be awarded personally against the liquidators for unreasonable action and vexatious conduct, *Silvia v Brodyn Pty Ltd* [2007] NSWCA 55 and *Maylord Equity Management Pty Ltd v Reeltime Media Ltd*

*(No 2)* [2008] NSWSC 1133. The unreasonable and vexatious conduct of the liquidators was the deduction of the procurement fee despite knowledge of limitation and the unlawful imposition of interest. The liquidators could also have applied to the court for directions.

**[27]** On the two conflicting judgements, it was contended the judgment pronounced on 21 November 2018 was that the liquidators were ordered to bear the costs personally despite no wilful misconduct committed. This showed no error as the order for costs was consistent in both judgments.

## ANALYSIS AND FINDING ISSUES TO BE TRIED

**[28]** At the High Court, the parties had filed separate issues to be tried (encl 3/143–145 and 146–147). From these issues and the submissions, we are able to distill the principal issues to be as follows:

(a) whether GIE's claim is time barred;

(b) whether UEG's deduction of the procurement fee is time barred; and

(c) whether the liquidators are liable to GIE for the costs of the action on an indemnity basis.

## WHETHER GIE'S CLAIM IS TIME BARRED

**[29]** GIE's claim has to be viewed in the context of the various contracts as set out in the background facts. There is the main contract where Gammon-Road Builder was to perform works on a project with the supply of mechanical and electrical systems to be in turn performed by UEG under a subcontract. This was understood as the M&E work. This work was in turn to be performed by GIE pursuant to the sub-subcontract between UEG and GIE. The main contract and subcontract were subsequently novated to Gammon-CC1. Pursuant to a guarantee, Gammon Construction guaranteed Gammon-CC1's due performance of the subcontract to UEG.

**[30]** It was contended by GIE its claim is premised on the consent judgment sum and additional interest that was paid to UEG by Gammon Construction pursuant to the guarantee. Without the performance by GIE under the sub-subcontract, UEG would never have been able to recover under the guarantee. Further, this was rights and benefits pursuant to cll 2(8) and 2(D) of the sub-subcontract.

**[31]** It has to be borne in mind that GIE first made its claim vide the POD affirmed on 28 March 2011. The relevant part of the POD (encl 6/87–90) stated as follows:

2. That the above-named company was at the order for winding up the same viz, the 20th day of October 2005 isjustly and truly indebted to the above named creditor in the sum of:

...

d. US Dollar Nine Hundred Ninety Seven Thousand Seven Hundred and Fifty and Cents Seventy Only (USD997,750.70)

for

...

ii. balance payment due under a subcontract entered into between the above named creditor and the above named company for the Hanoi Sheraton Hotel Project.

**[32]** It was Seow's evidence that Gammon-CC1 did not pay GIE pursuant to his letter dated 22 November 2000. It is to be noted that the letter referred to the certificate of payment dated 6 November 2000 and for payment to be made to GIE. Seow further agreed that the claim in the POD is based on the certificate of payment dated 6 November 2000 that was due on 20 November 2000 (encl 3/21–22). We find that this is in accordance with cl 11(b) of the subcontract where the contractor is to pay to the subcontract who is UEG within 14 days of the receipt of the architect's certificate and cl 10(8) of the sub-subcontract where UEG shall procure and ensure the main contractor pays direct to GIE in accordance with the payment terms under the M&E contract.

**[33]** Further GIE had pleaded in para 20 of its statement as follows:

20. By a Final Certificate dated 6.11.2000, GDP Architects certified, inter alia the final M&E Contract Sum and final payment amount due and payable to the 1st Defendant by the Main Contractor pursuant to the Final Certificate. Notwithstanding the certification by the Architect, the Main Contractor failed and/or refused to make payment to the Plaintiff.

**[34]** We therefore find that by GIE's own evidence, GIE's claim in its POD is based on the architect's certificate of payment dated 6 November 2000 which became due on 20 November 2000. The cause of action accrued on 20 November 2000 and limitation would have expired on 20 November 2006 by virtue of s 6(1)(a) of the Limitation Act. GIE's claim filed on 14 December 2017 is thus time barred.

**[35]** GIE's claim cannot possibly arise from the guarantee notwithstanding Onn's evidence that the consent judgment is pursuant to the M&E contract and was entered into pursuant to the work performed by GIE. This is due to the POD clearly being based on the certificate of payment and para 20 of the statement of claim and the references to rights and benefits in the sub-subcontract dated 15 August 1996 pre-dates the guarantee dated 20 August 1997. The sub-subcontract could not therefore have envisaged any

rights and benefits accruing after the event in the form of the guarantee to accrue subsequently to GIE. Further, the guarantee is between Gammon Construction and UEG and so too the consent judgment. This was precisely Onn's evidence where he stated UEG's settlement was pursuant to the guarantee and not the 'main contracts'.

**[36]** As we find GIE's claim to be time barred, we will not deal with the issue of its claim being an process in the context of whether it ought to have applied to the court to reverse or vary the decision of the liquidators in the letter dated 2 November 2015 in accordance with r 93 of the Companies (Winding-Up) Rules 1972.

WHETHER UEG'S DEDUCTION OF THE PROCUREMENT FEE IS TIME BARRED

**[37]** The POD was affirmed on 28 March 2011 for a sum of USD997,750.70 of which USD179,075.81 was admitted by the second appellant on 2 November 2015 and received by GIE on 11 December 2015. In between that period, GIE had on 24 November 2015 expressed its dissatisfaction, where nevertheless the second appellant maintained its position by letter dated 24 November 2015.

*Deduction of USD445,660.95*

**[38]** The total deduction amounted to USD445,660.90, for which GIE conceded that USD29,876.38 could be deducted. This leaves an amount of USD415,784.52 which according to GIE cannot be deducted as it is time barred.

**[39]** We were referred to a table contained in an appendix to the second appellant's letter dated 2 November 2015. This showed the fees were due progressively from 22 July 1996 to 12 March 1998. According to GIE, UEG's cause of action to recover the procurement fee would expire progressively from the period from 21 July 2002 to 11 March 2004 and limitation has set in.

The table is reproduced in its original form as below:

| GIE | | | UEG | | | |
|---|---|---|---|---|---|---|
| | | | 3% Procurement Fee Payable to UEG | | | Total Outstanding |
| No. | Dated of Receipt | Net Amount Received by GIE | 3% Procurement Fee | Due Date (within 14 days) | Interest up to 25 August 2015 based on KLIBOR + 1% | |
| | | USD | USD | | USD | USD |
| 1 | 8-Jul-96 | 839,999.00 | 25,199.97 | 22-Jul-96 | 24,434.05 | 49,634.02 |
| 2 | 2-Aug-96 | 839,999.00 | 25,199.97 | 16-Aug-96 | 24,341.52 | 49,541.49 |
| 3 | 6-Dec-96 | 351,597.00 | 10,547.92 | 20-Dec-96 | 9,883.14 | 20,431.06 |
| 4 | 6-Dec-96 | 64,779.00 | 1,943.39 | 20-Dec-96 | 1,820.91 | 3,764.31 |
| 5 | 27-Jan-97 | 80,114.00 | 2,403.43 | 10-Feb-97 | 2,223.23 | 4,626.67 |
| 6 | 27-Jan-97 | 59,538.92 | 1,786.17 | 10-Feb-97 | 1,652.25 | 3,438.41 |
| 7 | 17-Mar-97 | 180,816.00 | 5,424.48 | 31-Mar-97 | 4,956.60 | 10,381.08 |
| 8 | 24-Apr-97 | 411,222.70 | 12,336.68 | 8-May-97 | 11,163.21 | 23,499.89 |
| 9 | 22-May-97 | 1,096,721.92 | 32,901.66 | 5-Jun-97 | 29,551.45 | 62,453.11 |
| 10 | 2-Jun-97 | 1,239,023.80 | 37,170.71 | 16-Jun-97 | 33,289.47 | 70,450.19 |
| 11 | 27-Jun-97 | 2,281,888.32 | 68,456.85 | 11-Jul-97 | 60,893.85 | 129,350.49 |
| 12 | 30-Aug-97 | 810,055.24 | 24,301.66 | 13-Sep-97 | 21,231.99 | 45,533.64 |
| 13 | 10-Sep-97 | 1,356,205.34 | 40,686.16 | 24-Sep-97 | 35,432.84 | 76,119.00 |
| 14 | 22-Sep-97 | 1,152,854.85 | 34,585.65 | 6-Okt-97 | 30,008.47 | 64,594.12 |
| 15 | 22-Sep-97 | 2,208,140.35 | 66,244.21 | 6-Okt-97 | 57,477.24 | 123,721.45 |
| 16 | 24-Oct-97 | 840,842.95 | 25,225.29 | 7-Nov-97 | 21,656.44 | 46,861.73 |
| 17 | 12-Feb-98 | 25,048.65 | 751.46 | 26-Feb-98 | 619.00 | 1,370.46 |
| 18 | 26-Feb-98 | 20,635.54 | 619.07 | 12-Mar-98 | 507.00 | 1,126.07 |
| 19 | | | 29,876.38^ | | | 29,876.38 |
| | | 13,859,484.10 | 445,660.90 | | 371,142.66 | 816,803.57 |

The Final amount of USD29,876.38 was calculated based on the final contract sum of USD995,879.38.

There appears to be no dispute that the table showed those dates.

**[40]** However, the issue that requires our consideration, as per UEG's contention, is whether the word 'action' in ss 2 and 6 of the Limitation Act can be construed to exclude steps taken to recover amounts without involving the courts.

**[41]** Sections 2(1), 6(1)(a) and 31 of the Limitation Act are therefore relevant to the issue at hand. These provisions state as follows:

2 Interpretation

(1) In this Act, unless the context otherwise requires —

'action' includes a suit or any other proceeding in a court of law;

6 Limitation of actions of contract and tort and certain other actions

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

A (a) actions founded on a contract or on tort;

Provisions as to set off or counter-claim

31 For the purposes of this Act, any claim by way of set off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the
B action in which the set off or counterclaim is pleaded.

**[42]** In this regard we are much guided by an earlier decision of this court in *Majlis Perbandaran Klang* at p 643 as follows:

C [14] ... He contended that the interpretation given by learned counsel for the respondent and accepted by the learned judge led to absurdity in that steps taken by a creditor to recover any amount from a debtor without involving the court would be classified as an 'action'. The word 'includes' found in the definition of 'action' should not be read to enlarge the meaning of action. The definition of 'action' in s 2
D should be confined to any form of court proceedings including a suit as contained therein. He then cited the Privy Council decision in *Dilworth & Ors v The Commissioner of Stamps* [1899] AC 99 at p 106 where Lord Watson explained that the word 'includes' in a statutory definition would not in all cases enlarge the meaning but could in its statutory context mean the thing further described in which case it is exhaustive.

E [15] We are in agreement with the appellant that the word 'includes' in the definition of 'action' is not capable of being enlarged. In our view, the definition of the word 'action' in s 2(1) refers only to proceeding or suits in a court of law. This is strengthened by the fact that limitation could only be raised as a defence.

F **[43]** This case clearly shows that the word 'action' refers only to proceedings or suits in a court of law. The deduction of the procurement fee was an action not involving the courts and neither was it a claim for set off or a counterclaim. In the circumstances of the appeal, the deduction cannot be said to be barred by
G limitation.

**[44]** The case of *PTL Marketing Services Sdn Bhd* relied on by GIE and referred to by the High Court can be distinguished. That case involved a set off where the court in para 47 did not allow the attempt to distinguish between the
H defence of set off with the word 'action'. It also stated at p 347:

So the argument that the 'set off was not an 'action' cannot be sustained in the face of the clear and plain wordings of s 31 of the Limitation Act 1953. And given that the 'set off was an action within the context of the Limitation Act, 1953, this would then attract the operation of s 6(3) of the same Act which clearly prohibited the
I plaintiff from claiming the set off because it was clearly out of time ...

**[45]** We therefore agree with the proposition of law advanced in *Majlis Perbandaran Klang* that the issue of limitation can only be raised if there is a legal suit commenced to recover the amount concerned. It does not apply to a

situation where UEG is deducting the procurement fee from a sum it recovered on its own when it sued on the guarantee.

**[46]** We are fortified by another decision of this court in *Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v Yeoh Oon Theam* [2016] MLJU 1126 at para 35, where it was, inter alia, held:

> [35] To our minds, that will be stretching the meaning of the word 'action' beyond what section 2(1) requires in its application to s 6(1)(d) and 6(4). It will lead to an absurd result whereby all similar administrative acts by the relevant authorities having similar statutory powers as those exercisable by the appellant will be subject to limitation of action under the Limitation Act although the exercise of such powers does not involve any 'proceeding in a court of law'.

**[47]** Thus the word 'action' in s 2 and 6 of the Limitation Act should only refer to proceedings in court and is not capable of being enlarged to proceedings out of court. Section 31 in turn is clearly confined to a set off.

**[48]** A procurement fee is provided for in cl 10(A) of the sub-subcontract. cl 10 on the price and payment is reproduced as follows:

> (A) In consideration of the services to be rendered by GIE under this Agreement, GIE shall be paid a subcontract sum (the 'subcontract Sum') equivalent to the contract sum (before deduction of 2% of profit tax which will be levied by authority in Vietnam and to be paid by GIE) payable by the Main Contractor to UEG under the M&E Contract (the 'M&E Contract Sum') less UEG's procurement fee of three per cent (3%) of the M&E Contract Sum ('the Procurement Fee') in accordance with Sub-cl (B) below. There shall be no variation of the subcontract Sum save as a result of any variations in the M&E Contract Sum or the Works to be performed by GIE in accordance with cl 13.
>
> (B) Without prejudice to UEG's primary obligation to make payment of this subcontract Sum to GIE, UEG shall procure and ensure that the Main Contractor pays the M&E Contract Sum direct to GIE in accordance with the payment terms under the M&E Contract. GIE shall within a period of fourteen (14) days after receipt of the M&E Contract Sum from the Main Contractor pay to UEG the Procurement Fee by way of a telex transfer made out in favour of UEG.

**[49]** Pursuant to cl 10(A) it is not disputed that UEG's procurement fee is 3% of the M&E contract sum. cl 10(8) then required GIE to within 14 days after receipt of the M&E contract sum from the main contractor to pay to UEG the procurement fee. This is therefore an express contractual right due to UEG. Despite this, it would appear that GIE had kept the procurement fee for each certificate of payment all along. From the evidence of Onn, it was discovered after the creditors meeting on 31 March 2012 that the procurement fee on the entire contract sum had not been paid and what was known then was based on the statement of affairs which showed about USD29,000 (encl 3/65).

A It would be inequitable for GIE to now rely on limitation when it had benefitted from being allowed to keep the procurement fee when it would otherwise have to pay to UEG on each certificate of payment.

B **[50]** We also agree that GIE had acknowledged, accepted and admitted that UEG is entitled to the deduction. This can be seen as follows:

(a) letter dated 15 October 2016 from GIE's solicitor (encl 6/144–145) 'Taking into consideration the procurement fee of 3% of the contract sum due to the company as provided for in the subcontract amounting C to USD445,660.90 ... an amount of ... is due and owing to our client';

(b) affidavit affirmed on 8 May 2017 (encl 6/146 at p 155) where Seow stated as follows:

> 28 Pursuant to terms of the subcontract, GIE is entitled to the full sum of the D Consent Judgment Sum and the Further interest subject to a deduction of the 3% Procurement Fee of USD445,660.90, ieGIE is entitled to an amount of USD770,171.29.

(c) notice of motion dated 15 May 2017 (encl 7/13 at p 15) where one of E GIE's grounds was:

> 6 As at date of filing, UEG is still indebted to GIE the sum of USD591,095.48 ('the Sum Due and Owing') being the sum of the Consent Judgment Sum and the Additional Interest less the 3% Procurement Fee and the amount of USD179,075.81 which the liquidators paid to GIE;

F

**[51]** GIE's response was that these were all after the liquidators' letter dated 2 November 2015 notifying the deduction in the POD. Reference was made to ss 26(2) and 27(1) Limitation Act and *Wee Tiang Teng* where an G acknowledgment has to be for a debt subsisting at the time of acknowledgment and not before, or after the acknowledgment.

**[52]** We find that the reliance on ss 26(2) and 27 is misplaced. Section 26 is a provision which deals with a fresh accrual of action on acknowledgment or H part payment. This is where there is a fresh accrual of action and s 26(2) steps in:

> 26(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges I the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:

Section 27(2) then deals with how the acknowledgment is to be made which is to be writing and signed by the person concerned.

**[53]** This was also the context of *Wee Tiang Ten* where it was stated at p 56: **A**

> There are three kinds of:
>
> (1) an acknowledgment by the debtor that a debt subsisted in the past but not at the time of the acknowledgment;
>
> (2) an acknowledgment that it subsists at the time of the acknowledgment; and **B**
>
> (3) an acknowledgment that it may subsist in the future but not at the time of the acknowledgment
>
> In *Consolidated Agencies Ltd v Bertram Ltd* [1965] AC 470 the Privy Council at p 482 approved the following statement of an author on the law of limitation: **C**
>
> > To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgement. **D**
>
> Though that was a decision on the Indian Limitation Act, 1908, we would respectfully follow the principle therein stated, since the acknowledgments of kinds (1) and (3) are not really admissions that the debtor is indebted to the creditor. **E**

**[54]** Here, we are not dealing with a situation where UEG is relying on an acknowledgment within the meaning of s 26(2) by GIE for a fresh accrual of action. What UEG is essentially saying is that GIE has admitted to the debt and cannot therefore depart from it. We agree that there has been an admission by GIE and it is not an acknowledgment within the meaning of s 26(2) and 27 of the Limitation Act. **F**

**[55]** We are further of the considered opinion that the admission in the notice of motion being made in a pleading is a judicial admission which is on higher footing than an evidentiary admission. This has been laid down in *Yam Kong Seng* at p 487: **G**

> [16] ... It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission (*Sarkar's Law of Evidence*) with the respondent's admission therein be made the foundation of the rights of the parties (*Satish Mohan Bilal v State of UP* AIR 1986 All 126, at p 128 1985 All CJ 507). Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him. **H**

**[56]** We therefore find UEG's deduction of USD445,660.90 from the procurement fee is not time barred. **I**

*Deduction of late payment interest on the procurement fee*

**[57]** We agree with UEG's contention a deduction on late payment interest can be made.

**[58]** We had earlier referred to cl 10 of the sub-subcontract on price and payment. As may be recalled, cl 10(B) provided that GIE shall within 14 days of the receipt of the M&E contract sum pay to UEG the procurement fee. This is therefore an express contractual provision on the due date for payment of the procurement fee.

**[59]** Seow when referred to the due dates as stated in para 6.1 of the reply to defence stated these were the dates as set by UEG and when asked 'you accepted these due dates and you assert that the claim is time barred. Correct' replied 'Yes' (encl 3/45). Thus the due dates for payment had been accepted.

**[60]** Onn's evidence was that interest had been imposed at the rate of the Kuala Lumpur Interbank Offered Rate (KLIBOR) plus 1% up to 15 August 2015 which is the date UEG received payment of the procurement fee (Q&A 7, WS DW1, encl 3/129) and with reference to KLIBOR rates in encl 6/125–128). The evidence was not challenged.

**[61]** It is accepted as per Onn's evidence the sub-subcontract does not expressly allow for interest. There is however cl 10(B) which is an express contractual condition on due date for payment. Coupled with GIE's acceptance of when such due dates are, we find that the imposition of interest is a commercial decision which cannot be said to be fraudulent or unreasonable. Generally, interest is granted to compensate a party who is deprieved of the enjoyment of what is ordinarily due. This court in *Fairview Schools Bhd v Merger Insight (M) Sdn Bhd* [2017] MLJU 1031 stated:

> [18] ... The jurisprudence of interest is related to an attempt by the court to indemnify the claimant for loss of use of money which he was entitled in law to receive subject to law and rules of the court. Failing to do so will ordinarily enrich the losing party. In some jurisdiction, commercial interest is awarded and in some contractual interest is awarded and in Malaysia it may be subject to the law and rules of court; and the decision of the courts may be hybrid in nature to provide suitable indemnity and avoid the concept of unjust enrichment and/or miscarriage of justice to some extent ...

**[62]** We are reminded too of the decision in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629 at p 639:

> [24] Based on the above principles of law, we are of the view that the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. The court will not interfere with the decision simply because its opinion might differ from that of the liquidator.

**[63]** The interest rate imposed can thus be justified and we are not obliged to set it aside merely because we are inclined to a different decision from the liquidators.

**[64]** *Chuah Eng Khong* does not assist GIE where that concerned the issue of a contractual rate above the statutory rate.

WHETHER THE LIQUIDATORS ARE LIABLE TO GIE FOR THE COSTS OF THE ACTION ON AN INDEMNITY BASIS

**[65]** Given our finding that the deduction of amounts from the procurement fee and the imposition of late penalty interest isjustified and valid, the decision of the High Court for the liquidators to bear the costs of proceedings cannot stand. We find it not necessary to dwell on the issue raised of the conflict between the judgment in open court pronounced on 21 November 2018 with the written grounds of judgment dated 11 March 2019.

CONCLUSION

**[66]** We therefore allowed the appeal and set aside the whole of the High Court judgment dated 21 November 2018 with costs of RM40,000 here and below, subject to allocatur.

*Appeal allowed.*

Reported by Ashok Kumar